Supreme Court
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MICHAEL RODAK,

IN THE

Supreme Court of the United States

No. 73-1360

LEO BRAMSON and MARVIN WELFELD, individually and as Trustees for themselves and the limited partners of CHIGLADES FARM, LTD., *Petitioners,*

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, and A. J. SULLIVAN OF FLORIDA, INC., a Florida Corporation, *Respondents.*

BRIEF IN BEHALF OF A. J. SULLIVAN OF FLORIDA, INC. IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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INDEX

	Page
Introductory	1
Petitioners' Questions Presented	3
Statement of Case	5
No Reason for Granting Petitioners' Application for Writ of Certiorari	8
No Valid Antitrust Contention	9
The Florida Decisions	10
Conclusion	13
Appendix 1	14
Appendix 2	16

LIST OF CITATIONS

7 U.S.C. 608b	3, 9
7 U.S.C. 608c(6)	3, 6
Conner v. Sullivan, 160 So.2d 120	11
Mulford v. Smith, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092	5
Rabin v. Conner, 174 So.2d 721-726	10
Sec'y of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 70 S.Ct. 403, 94 L.Ed. 381	9
Stark v. Wickard, 321 U.S. 311, 88 L.Ed. 748	8

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INTRODUCTORY

As set forth herein, A. J. SULLIVAN OF FLORIDA, INC., a Florida corporation, the Respondent who is and has been a Florida celery producer, opposes the issuance of writ of certiorari herein as sought by Petitioners. Its position is that no consideration exists (as set out in Rule 19 or otherwise) for a review of this cause by this Court.

Review is sought by Petitioners of the decision of the Court of Appeals for the Fifth Circuit, October 10, 1973, 485 F.2d 1125 (set out at pages 1a-16a of Petitioners' Appendix A).

That decision affirmed the summary judgment decision of the Southern District of Florida, August 1, 1972, 346 F.S. 935 (Petitioners' Appendix B)—which held against Petitioners on all points raised, and affirmed the decision of the Secretary of Agriculture of September 10, 1970 (not reported)—copied as Petitioners' Appendix C.

The District Court's decision was that the findings and conclusions of the Secretary's decision ("Review of Florida Celery Committee's Determination") be affirmed, and that there is no merit to any of the Petitioners' contentions.

The Secretary's decision was in a proceeding entitled "Application of Chiglades Farm, Ltd., a Limited Partnership, for a Base Quantity under Marketing Order 967", dated September 10, 1970 (not reported—but set out in full as Petitioners' Appendix C.[1]

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[1] "In its application for a Base Quantity, Chiglades claimed, among other things, that it was entitled to the Base Quantity, either in whole or in part, which previously had been issued to and held by A. J. Sullivan of Florida Incorporated". (App. C—p. 35a)

"On May 9, 1969, Chiglades Farm Limited (Chiglades) filed its petition with the Florida Celery Committee (committee) seeking a Base Quantity • • • ". (App. C—p. 35a)

"The one hearing was held in Orlando, Florida, on June 19 and July 1 and 2, 1969 (before a Hearing Examiner and the Committee) • • • (and)

"The Examiner issued recommended findings and a recommended decision on January 30, 1970. Exceptions were filed • • • and the Committee, acted upon all the information before it and determined on April 15, 1970, that Chiglades was not entitled to a Base Quantity." (App. C—p. 37a)

That proceeding included a decision adverse to Petitioners by the Hearing Examiner, a second adverse decision by the Florida Celery Committee, and as stated above a final adverse decision by the Secretary of Agriculture on Review. Thus, there have been five decisions adverse to Petitioners on the factual and legal issues, viz: (1) by the Hearing Examiner, (2) by the Florida Celery Committee, (3) by the Secretary of Agriculture, (4) by the U.S. District Court for the Southern District of Florida, and (5) finally, by the Court of Appeals for the Fifth Circuit.

PETITIONERS' QUESTIONS PRESENTED

There is no basis in the Record for this Court to become involved in the considerations posed by Petitioners' "Questions Involved". They are:

(1) Whether Marketing Order for Celery Grown in Florida is authorized by the Federal Statutes, the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(6)(B).

(2) Whether additional consideration should have been given by the Secretary to "antitrust consequences", even though the statute (7 U.S.C. 608b), expressly provides a specific exemption to the antitrust laws (7 U.S.C. 608b), and the Secretary found, as did both Courts, that the Marketing Order was not "in violation of any of the antitrust laws of the United States"—see Appendix 2 hereto, and Petitioners' Appendix B (p. 27a) and Petitioners' Appendix A (p. 16a).[2]

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[2] USDC (p. 27a) "Chiglades also contends, however, that the Secretary had an affirmative duty to consider anti-trust implications by determining whether the anticompetitive effects of Order 967 are justified by public need. Carnation Co. v. Pacific West-

It is pertinent to note that nowhere in the proceedings in the Courts below nor in this Court do Petitioners in any wise challenge the validity of the statute—but to the contrary they concede it. Initially, they sought the unwarranted transfer of the Base Quantity of Sullivan, Inc. to Chiglades. Failing that, they sought (in 1969) an unauthorized new Base Quantity for Chiglades. And, as a last resort, they challenge Marketing Order 967 as being a departure from the terms of the statute. Only if they fail to obtain the benefits accorded to celery producers (as well as the entire celery industry and the consuming public) under Order 967, do they seek to have that Order declared invalid.

In their phraseology of Question No. 1, Petitioners err in their statement of fact, viz: Order 967 "is vir-

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bound Conference, supra and Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 88 S.Ct. 1005, 19 L.Ed.2d 1071 (1968) construed the Shipping Act of 1916 and held that only limited immunity from the anti-trust laws was provided for in the Act and the Federal Maritime Commission's own formula of 'public interest' was the proper standard. These cases are distinguishable from the case at bar. The anti-trust exemption provided by 7 USC § 608b is clear, unequivocal and unlimited. No prior determination by the Secretary is required. Order 967 is thus exempt from the anti-trust laws." Court of Appeals (p. 16a): Antitrust Problems. Under 7 U.S.C.A. § 608b,

The making of any such (marketing) agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful.

Plaintiffs maintain that, insofar as Marketing Order No. 967 exceeds its statutory authority, this antitrust immunity is inapplicable. Having found no abuse of authority, however, we must conclude that the immunity is undisturbed. Where such total immunity is granted, there can be no violation of the antitrust laws. See Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973).

tually *identical* to a Florida state celery marketing program" etc. Such is not the fact. The Florida order regulated producers; neither the Federal Statute nor the Federal Marketing Order 967 regulates producers but only handlers in interstate commerce. The District Court noted that "Section 608c does not actually regulate producers *in their capacity as producers*" (p. 28a of Pet. App. B). The Court of Appeals also noted that although the Florida Statute "was similar in objectives and mechanics to the Federal Marketing Order, there is one crucial difference" (Pet. App. A p. 74a) and "the base quantities are not, as plaintiffs allege, 'perpetual transferrable licenses' which operate to preclude entry of new producers into the industry" (p. 13a). And the Court of Appeals quoted as follows from *Mulford* v. *Smith,* 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092 (1939):

> "The statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota." 307 U.S. at 47, 59 S.Ct. at 652.

STATEMENT OF CASE

On July 9, 1965, proceedings were initiated by the Secretary of Agriculture with respect to the issuance of a Federal Marketing Order with respect to Florida celery. After public hearings, and affirmative votes by producers and handlers of Florida Celery, Marketing Order 967 was duly issued effective November 15, 1965.

In 1962 a limited partnership under Florida law, Chiglades Farm, Ltd. was formed by Leo Bramson and Marvin Welfeld as general partners and Eugene

McCabe and others as limited partners. This limited partnership entered into a joint venture agreement, December 1, 1965, with A. J. Sullivan of Florida, Inc. (referred to as Sullivan), with respect to the production of celery by Sullivan, its marketing and accounting for net profits. The Joint Venture Agreement recited:

> "Whereas, Sullivan has applied for a federal quota slightly in excess of 300,000 crates; and
>
> "Whereas, the joint venture will operate under this new quota;"

Pursuant to the joint venture, Sullivan, Inc. duly registered its marketed production in previous years and received from the Florida Celery Committee (the administrative agency appointed by the Secretary) its Base Quantity Certificate. This "Base Quantity" is simply the registered volume of sales of each producer, on which the marketable allotment may be figured which can be sold or marketed by an authorized handler. It is pertinent to note that without such registration, there would have been no means of assuring that the policy of the Act (7 U.S.C. 608c(6)) could not have been implemented—"Allotting or providing methods for allotting the amount * * * (of celery) * * * which each handler may purchase from or handle on behalf of all producers thereof * * * under a uniform rule based upon the amounts sold by such producer in such prior period as the Secretary determines to be representative * * * to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers." During the ensuing seasons of 1965-66 and 1966-67, Sullivan, Inc. produced celery pursuant to the joint venture, and

marketed its allotment through Pioneer Growers Co-operative, who sold and accounted to Sullivan, Inc. therefor.

Chiglades did not file any report with the Committee prior to December 1965 (as required by the Order), and in fact filed nothing until May 12, 1967, when it filed an application for Base Quantity, which was denied by the Florida Celery Committee.

Celery production and marketing pursuant to the joint venture terminated about the end of the 1966-67 celery season. Meanwhile, on January 12, 1967, the general partners of Chiglades Farm, Ltd. filed suit in the Circuit Court of Palm Beach County, Florida (Ex. 42 of Administrative Record R.1359-1384), which was decided adversely to Chiglades on September 27, 1967, and appeal therefrom to the Fourth District Court of Appeals was dismissed on April 5, 1968.

Another suit was filed in the Circuit Court of Palm Beach County, Florida, on August 12, 1967 by the general partners of Chiglades, which suit was voluntarily dismissed on January 17, 1968. See footnote to Decision of Court of Appeals, 5th Circuit, p. 5a of Appendix A of Petition.

On December 5, 1967, Eugene A. McCabe filed complaint against all partners of Chiglades seeking an accounting and dissolution of the limited partnership. Final Judgment of Dissolution was entered on April 21, 1970, by the Circuit Court of the 15th Circuit of Florida, and affirmed by the Fourth District Court of Appeals of Florida, and petition for certiorari was dismissed by the Supreme Court of Florida.

It should be noted that such State Court action in its entirety, including the Dissolution of Chiglades, ante-

dated the filing of Complaint herein in the District Court of the District of Columbia (later transferred to Southern District of Florida).

On May 9, 1969, Chiglades requested a Base Quantity; and this letter was the origination of the proceeding before the Secretary of Agriculture, the latter's decision of September 10, 1970, the U.S. District Court (S. Dist. of Fla.) Appendix B, and the Court of Appeals' decision of October 10, 1973—Petitioners' Appendix A.

NO REASON FOR GRANTING PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

It is erroneously stated on page 7 of Petition that "the decision of the court of appeals on the producer quota issue is in conflict with this Court's opinion in *Stark* v. *Wickard,* 321 U.S. 288, 303 (1944)." To the contrary, the only issue determined therein was that the petitioners there "have shown a right to a judicial examination of their complaint." This Court in *Stark* v. *Wickard,* at 321 U.S. 311, 88 L.Ed. 748, said:

> "It hardly need be added that we have not considered the soundness of the allegations made by the petitioners in their complaint. The trial court is free to consider whether the statutory authority given the Secretary is a valid answer to the petitioners' contention. We merely determine the petitioners have shown a right to a judicial examination of their complaint."

To the contrary as stated by the Court of Appeals (Petitioners' Appendix A p. 8a):

> "Weighing these facts, the District Court concluded that the Secretary's decision that the base quantity should remain with the Sullivan corpora-

tion was neither arbitrary, capricious, nor unsupported by substantial evidence. We agree."

Also, (Pet. App. A p. 10a):

"The District Court found that '(s)ince present and past demand for celery has been limited, an increase in the total base quantities for the industry (permitting issuance of a reserve quota) is currently unwarranted,' and the Secretary's refusal to grant one met the substantial evidence standard."

And (Pet. App. A p. 11a):

"To justify the Marketing Order, the Secretary of Agriculture distinguished between the permissible regulation of the amount which a producer may sell to a handler and the prohibited regulation of the amount a producer may grow. * * * the Supreme Court has found such a distinction valid under the Agricultural Adjustment Act. In Mulford v. Smith, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092 (1939), * * * the Court upholding the regulatory system, found that '(t)he statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota.' 307 U.S. at 47, 59 S.Ct. at 652."

See, also, *Sec'y of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 70 S.Ct. 403, 94 L.Ed. 381 (1950).

NO VALID ANTITRUST CONTENTION

A complete answer to all contentions by Petitioners respecting antitrust regulation, is the "clear, unequivocal and unlimited" exemption contained in 7 U.S.C. 608b.

The discussion thereof in the Secretary's decision on Review is set forth in Appendix 2 hereto, for convenience.

The consideration thereof by the District Court, is contained on pages 26a and 27a of Petitioners' Appendix B.

And the decision of the Court of Appeals is succinctly set forth on page 16a of Petitioners' Appendix A.

Nothing further need be said.

THE FLORIDA DECISIONS

Although in this Court, Petitioners seem to have abandoned their claim to the Base Quantity of A. J. Sullivan of Florida, Inc., under Federal Marketing Order 967, they now raise here only two questions, one as to the validity of the entire Order 967 and two as to antitrust considerations (despite the express statutory exemption under 7 U.S.C. 608).

Petitioners make the argument that Federal Order 967 is invalid because a 1965 decision of the Supreme Court of Florida held certain features of a Florida Celery Marketing Order to be invalid. (See Petitioners' Appendix E, pages 81a-90a). The concluding part of the Florida Court's opinion in *Rabin* v. *Conner*, May 5, 1965, 174 So.2d 721-726 was:

> "This illustrates well that the regulation has been of benefit to those permitted to produce celery, and is strong evidence in favor of a planned and controlled agricultural economy. Nevertheless, it does not overcome or satisfy the infirmities above described.
>
> "For the foregoing reasons we hold those portions of the marketing order and the statute which

authorize and award allotments of base quantities on the basis of production in a prior representative period to be unconstitutional and void." (p. 90a Pet. App. E).

Both the District Court (App. B pp. 30a-33a) and the Court of Appeals (App. A pp. 13a-15a) in substance held that the Florida decision as to the Florida Marketing Order was neither controlling nor persuasive as to the validity of Federal Marketing Order 967. In addition to what was said by the Courts below, it is proper to add that where Congress has exercised its power to legislate with respect to Interstate Commerce, the Federal legislation is exclusive. And, as otherwise herein noted, the decisions of this Court are to the effect that both the Federal Statute 7 U.S.C. 601 etc. and Marketing Order 967 are valid.

There were other State Court decisions shown by the record.

Sullivan initially grew celery in 1939. He obtained his quota under the Florida Marketing Order, as the result of a decision of the Circuit Court of Leon County, Florida, affirmed July 25, 1963 in *Conner* v. *Sullivan,* 160 So. 2d 120.

The District Court (Pet. App. B p. 30a) noted that Federal "Order 967 was designed to fill the vacuum left after the Florida statute was held void".

The Court of Appeals took notice of three additional State Court actions (footnote App. A p.4a, 5a). These three suits were:

1. Complaint by Leo Bramson and Marvin J. Welfeld, general partners of Chiglades Farm, Ltd. v.

Eugene A. McCabe, filed January 12, 1967 in the Circuit Court of the Fifteenth Judicial Circuit of Florida, Palm Beach County. Final Decree against Chiglades was entered September 27, 1967, and the appeal by Bramson and Welfeld to the District Court of Appeal, Fourth District of Florida, was dismissed by that Court on April 5, 1968.

2. Complaint by Leo Bramson and Marvin Welfeld, general partners of Chiglades Farm Ltd. v. A. J. Sullivan of Florida, Inc. was filed August 16, 1967 in Circuit Court of Palm Beach County, Florida and dismissed by plaintiffs on January 17, 1968.

3. Complaint by Eugene A. McCabe v. Leo Bramson and Marvin J. Welfeld (and the limited partners of Chiglades Farm, Ltd.) was filed December 5, 1967, in the Circuit Court of Palm Beach County, Florida—seeking a dissolution of the limited partnership and an accounting. Final Judgment of Dissolution was rendered on April 21, 1970. That final judgment of dissolution was affirmed by the District Court of Appeal, Fourth District of Florida, and petition for certiorari was dismissed by Supreme Court of Florida.

See pages 4-7, Brief of Appellee, A. J. Sullivan of Florida, Inc. before Court of Appeals.

The Complaint herein was not filed in the District Court of the District of Columbia until October 19, 1970—just two days short of six months following Decree of Dissolution. And—A. J. Sullivan of Florida, Inc. was not made an additional party until May 1971—more than a year after dissolution.

It would seem on well established principles of law that the State Circuit Court, which first acquired juris-

diction of the parties should be permitted to proceed with its accounting procedures, without the parties being compelled at the same time to defend a certiorari in the Supreme Court.

CONCLUSION

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be dismissed. This would leave in force the conclusion of the Secretary of Agriculture, viz:

> "With respect to the contention that the program itself is unconstitutional, there can be no doubt as to the constitutionality of the Act and Orders which are promulgated thereunder. (United States v. Rock Royal Coop., Inc., 307 U.S. 533 (1939); H. P. Hood & Sons, Inc. et al v. United States, 307 U.S. 588 (1939); Edwards v. United States, 91 F.2d 767 (9th Cir., 1937); Wallace v. Hudson-Duncan & Co., 98 F.2d 985 (9th Cir., 1938); American Fruit Growers, Inc. v. United States, 105 F.2d 722 (9th Cir., 1939); Queensboro Farm Products, Inc. v. Wickard, 47 F.Supp. 206 (1942), aff'd. 137 F.2d 969 (2d Cir., 1943); United States v. Goldsmith Fruit Co., 19 F.Supp. 147 (S.D.Fla., 1947)."

Respectfully submitted,

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APPENDIX 1

Excerpts from Secretary of Agriculture decision on review of Florida Celery Committee's Determination (set out in full in Petitioners' Appendix C, pages 35a-72a).

Page 56a:

An Application for a Base Quantity on either the basis of a history of production or firm and substantial commitments to produce celery prior to September 30, 1965, has to be filed with the Committee prior to December 20, 1965, in accordance with the procedural requirements set

Page 57a:

forth in Section 967.151(a) of the Order. Since Chiglades did not make such an application prior to that date, it has failed to meet that procedural requirement which was necessary to achieve the purposes of the program, to the extent it claims it is entitled to a Base Quantity because it has a history of production or because it had made prior firm and substantial commitments to produce celery.

In any event, Chiglades is not entitled to a Base Quantity, without regard to the lateness of its Application, because it has failed to sustain its burden of showing it is entitled to such a Base Quantity on one or more of the four bases set forth above.

* * *

The record shows that Chiglades never produced celery, nor had it made firm and substantial commitments to do so, in its own capacity. * * *

Page 58a:

The terms of both the 1962 and the modified 1965 joint venture agreements expressly show that Chiglades never assumed producer status, * * *

Page 59a:

In view of the facts set forth above, and heretofore stated, it is clear that Chiglades was not a producer, • • •

• • •

In view of the relevant facts, it is our conclusion that neither Chiglades nor the joint venture can show: (1) a history of celery production and marketing; (2) firm and

Page 60a:

substantial commitments for the production of celery, and actual involvement in such production prior to September 30, 1965; or (3) that there was a transfer of Sullivan Inc.'s Base Quantity either to Chiglades or the joint venture. Rather, the record is conclusive that Sullivan Inc., retained its status as a producer and its rights to its Base Quantity.

• • •

Therefore, Chiglades has no history of production of its own.

• • •

Page 65a:

• • • It is clear that Sullivan Inc. was and is a producer, that Chiglades has never qualified for a Base Quantity as a producer, and the joint venture agreement by its terms precluded the joint venture from qualifying for a Base Quantity.

• • •

APPENDIX 2

Discussion in order of Secretary of Agriculture on review of Florida Celery Committee's determination (set out in full in Petitioners' Appendix C) as to anti-trust.

Page 68a:

There is a short answer to the contention of Chiglades that industry control violates the Sherman Act. The purpose of a marketing order is to regulate an industry for the benefit of its members and the public by effectuating orderly marketing of the commodity involved. (See 7 U.S.C. § 601). The entire tone of the Act is one which intends that trade should be regulated under marketing orders, in accordance with the Act, to achieve the above-stated purpose. The involvement of the industry is in accordance with the Act (See Section 608c(7)). In addition, a specific exemption to the antitrust laws of the United States is provided in Section 608b of the Act. That section states:

> "In order to effectuate the declared policy of (the Act) . . ., the Secretary of Agriculture shall have the power * * * The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: (7 U.S.C. 608b).

There is presently in effect such an agreement with virtually all handlers of celery grown in Florida. This agreement exactly parallels the Marketing Order. Furthermore, it is clear that it is the intent of the Act that marketing orders shall regulate the agricultural industry involved. Such regulation cannot be in violation of the antitrust laws because it has been undertaken in strict conformity with the provisions of the Act. (citations).